**Editor's note: 93 I.D. 288; Reconsideration denied by Order dated Sept. 22, 1986; Appealed -- aff'd No. 91-36341 (9th Cir. Sept. 3, 1993), 3 F.3d 1348; See also 34 IBLA 25**

UNITED STATES
v.

ELMER H. SWANSON
LIVINGSTON SILVER, INC.

IBLA 82-844
73-338

Decided July 14, 1986

Appeal from a decision of Administrative Law Judge Robert W. Mensch declaring 16 millsite claims valid in part and void in part in mining contest ID 13351, consolidated with judicial remand of United States v. Swanson, 34 IBLA 25 (1978) (supplementing United States v. Swanson, 14 IBLA 158, 81 I.E. 14 (1974)).

Administrative Law Judge's decision affirmed as modified in part and reversed in part; United States v. Swanson, 34 IBLA 25 (1978), modified.

1. Millsites: Generally -- Mining Claims: Millsites -- Rules of Practice: Appeals: Burden of Proof

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.A. @ 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

2. Millsites: Generally -- Millsites: Dependent --Millsites: Determination of Validity -- Mining Claims: Millsites

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.A. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

3. Millsites: Generally -- Millsites: Determination of Validity -- Mining Claims: Millsites

While the existence of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.A. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.A. § 51 (1970), but is not a qualifying use under 30 U.S.A. § 42 (1982).

4. Millsites: Generally -- Millsites: Determination of Validity -- Mining Claims: Millsites

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lode with which the millsites are associated.

5. Millsites: Generally -- Millsites: Determination of Validity -- Mining Claims: Millsites

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use should generally be limited to each 2-1/2 acre aliquot part of the location.

APPEARANCES: Erol R. Benson, Esq., Ogden, Utah, for the Forest Service, United States Department of Agriculture; L. J. Ettinger, Esq., Challis, Idaho, for Livingston Silver, Inc., and Elmer H. Swanson.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This decision involves two separate proceedings relating to 23 millsites owned by contestees Livingston Silver, Inc., and Elmer H. Swanson within the exterior boundaries of the Sawtooth National Recreation Area (SNRA), established by the Act of August 22, 1972, 86 Stat. 612, 16 U.S.A. § 460aa (1982). In order to correctly understand the origin of the proceedings involved we will, initially, briefly review the chronology of events leading to this decision.

The original decision in United States v. Swanson, 14 IBLA 158, 81 I.E. 14 (1974), involved an appeal by the Forest Service, Department of Agriculture, from a decision of Administrative Law Judge Robert W. Mensch dismissing a contest complaint filed against seven millsites. 1/ These were denominated as the High Tariff, Clara, Little Falls, Livingston, May, Trensvalle, and Deadwood, and formed the core millsites in a total group of 23, on which Swanson and Livingston Silver, Inc., had constructed substantial improvements. In Judge Mensch's decision of March 7, 1973, he had concluded that the High Tariff, Clara, and Little Falls millsites were valid, 2// and further dismissed the contests against the other four millsite claims even though he was unwilling to make an affirmative finding that they were valid with respect to all of the land included therein because of inadequacies in

1/ While this decision also dealt with an unsuccessful cross-appeal filed by Swanson from a determination that three lode mining claims were null and void, this aspect of the case is not relevant to the proceedings herein.
2/ Whether or not it is proper to declare a millsite "valid" as opposed to merely dismissing the complaint is a matter which is examined later in the text.

the evidence presented by both sides. 3/ The Forest Service appealed as to all seven millsites.

In its decision, the Board rejected the Forest Service's contention that all of the millsite claims were invalid under the rule enunciated in Charles Lennig, 5 L.D. 190 (1886), viz., in the absence of actual use of the land for mining or milling purposes, the claimant must show "an occupation, by improvements or otherwise, as evidences an intended use of the land for mining or milling purposes." Id. at 192. After recounting Swanson's testimony that he and other workmen had lived on the millsites while work was done to recondition the patented Livingston Mine and stockpile ore from the mine onto the millsites, the Board concluded:

> While there was testimony indicating that various non-mining activities were being engaged in and that only a minor amount of ore had been withdrawn from the Livingston Mine, there was still adequate evidence of mining and storage activity demonstrating good faith use and occupation for mining and milling purposes.
>
> Appellant invested a considerable sum of money in acquiring his mining and milling properties and spent a number of years devoting labor and means to reconditioning the Livingston Mine and extracting and stockpiling millable ore. In 1972, appellant entered into a lease-purchase agreement with Mine Developers, Inc., in order to further exploit the worth of his mine and millsites. The Livingston Mine is now operative and the flotation mill above Jim Creek on the Trensvalle millsite has been put into production. The Judge concluded, and we agree, that the evidence

3/ Thus, Judge Mensch found:

"I am not willing, however, to conclude that the Livingston, May, Trensvalle and Deadwood mill sites are valid with respect to all of the land included within the mill sites. The evidence presented by the Forest Service does not support the assertion that more land is included within these four mill sites than is necessary for the storage of ore. However, the evidence as a whole is not adequate to sustain the conclusion that all of the land within the four mill sites is necessary for mining or milling operations." (Decision at 13).

> demonstrated a good faith intention to use some of the land within the contested millsites for mining and milling purposes. [Emphasis in original

14 IBLA at 170-71, 81 I.E. at 20.

The Board did, however, reverse Judge Mensch's decision to the extent that he had dismissed the complaint as to all millsite claims because of the Board's conclusion that the seven claims encompassed an area substantially in excess of what was needed for mining or milling purposes given the evidence of record. The Board noted:

> While all of the claims may not be held valid as presently located, we do not believe that they should be invalidated in toto since there are areas within each of the millsites that have been used or occupied for mining and milling purposes. Neither do we deem it feasible to select the millsite areas that the contestee may properly retain. The contestee is therefore allowed 90 days from receipt of this decision within which to amend his millsite locations to bring them into compliance with the law as we have discussed it.

14 IBLA at 181, 81 I.E. at 25.

Swanson failed to submit any proposed amendment of his millsite locations. 4/ Eventually, on February 14, 1977, the Forest Service submitted its recommendation that the High Tariff, Clara, Little Falls, and Livingston millsites be declared invalid in their entirety and that the May, Trensvalle

4/ Swanson did, however, attempt to obtain judicial review of the 1974 Board decision. This suit was dismissed by the District Court for the District of Idaho on the grounds inter alia, that the Board decision was not final by its own terms. See Swanson v. Morton, Civil No. 4-74-10 (Dec. 23, 1975).

and Deadwood millsites be declared invalid as to the south 620 feet of each. Swanson filed no response to this recommendation. Accordingly, by supplemental decision of February 14, 1978, reported at 34 IBLA 25, the Board adopted the Forest Service's recommendation. Swanson then sought judicial review of this decision.

While the Board was considering the Forest Service's recommendation, the Forest Service caused another contest complaint to be issued seeking a declaration that the remaining 16 millsite claims were invalid. See Contest IDAHO 13351. While we will examine this contest proceeding in some detail infra, suffice it for the present to note that by decision of April 27, 1982, Administrative Law Judge Mensch dismissed the contest as to various parts of 15 of the 16 millsites challenged, and found the remaining millsite null and void. The Forest Service duly appealed to this Board. In addition, Livingston Silver, Inc., and Swanson filed cross-appeals, contending that to the extent Judge Mensch failed to grant them all of the acreage in all of the millsites, the decision was in error.

On June 3, 1982, Chief Judge Marion J. Callister of the U.S. District Court for the District of Idaho issued his decision on the Swanson appeal pending before him. Swanson v. Andrus, Civil No. 78-4045. While Judge Callister agreed with the Board that it appeared that excess lands had been included in the original seven millsite locations, he disagreed with the supplemental opinion which granted Swanson only the area immediately adjacent to the mill (which was located in the north part of the May, Trensvalle, and Deadwood millsites). Thus, he noted:

> In accepting the Forest Service's proposal which reduced the mill sites to immediately around the mill, it appears that no consideration was given to or provision made for living quarters, offices, etc., clearly proper uses for mill site claims. The report of the Forest Service mining engineer was to the effect that "the level of legitimate mining and milling activity conducted by E. H. Swanson since 1972 cannot justify the current size and shape of the High Tariff, Clara, Little Falls, Livingston, May, Trensvalle and Deadwood millsites." While there might be some merit to that statement, the proposal submitted left no provision for structures other than the mill itself. Such a complete deletion of the mill sites which have existing structures which would provide for the work force for the mill is clearly improvident. The Court would conclude that the complete invalidation of the High Tariff, Clara, Little Falls and Livingston mill sites was arbitrary, capricious and unsupported by substantial evidence considering the record as a whole. The Board's decision should be reversed and remanded for a finding as to what area is necessary for use from those mill sites.

Memorandum Op. at 5. Judge Callister did, however, agree with so much of the Board's decision as rejected the south 620 feet of the May, Trensvalle, and Deadwood millsites, finding that adequate provision had been made for the storage of ore for winter use. Id. Accordingly, he affirmed the Board's determination as to these three millsites, but remanded the case "for a finding of the amount of land actually necessary for milling operations within" the High Tariff, Clara, Little Falls, and Livingston millsites.

Thus, at the present juncture, the Board has under consideration the remand by Judge Callister involving the High Tariff, Clara, Little Falls, and Livingston millsites, the appeal by the Forest Service of Judge Mensch's decision dismissing the contest against parts of 15 of 16 additional millsite claims, and the cross-appeal filed by Swanson and Livingston Silver. For purposes of our consideration, we will first examine the appeals from Judge Mensch's 1982 decision.

At this point, it is helpful to the understanding of the factual background of this case to quote from Judge Mensch's summary of the testimony adduced in 1981. Thus, Judge Mensch noted:

> Three of the claims, i.e., the Tram Terminal, Livingston -5/ and Jim Creek, were located in 1924 by a predecessor-in-interest to the present claimants. Seven of the claims, i.e., the Annex, Tramway, Tramway No. 2, Tramway No. 3, Tramway No. 5, Tramway No. 6 and Tramway No. 7, were located in 1963 by Elmer H. Swanson, one of the contestees. Three of the claims, i.e., the Tramway No. 8, Tramway No. 9 and Tramway No. 10, were located in 1968 by Swanson. The remaining three claims, i.e., the Park, Parker and Rene, were located in 1971 by Swanson.
> * * * * * * *
>
> By a receiver's deed executed in 1960, Swanson obtained title to seven patented lode claims, 28 unpatented mining claims, four millsite claims, and a tunnel site claim; together with all dwelling houses, buildings, tramways, powerplants, transmission lines and other improvements used in connection with mining and milling operations on the conveyed claims. The deed recites that Swanson paid $ 51,500 for the conveyance of the property. Three of the four millsite claims named in the deed are involved in this proceeding, i.e., the Tram Terminal, Livingston and Jim Creek. Following his acquisition of the property, Swanson located the other 13 millsite claims involved in this proceeding and seven other millsite claims that were involved in a previous contest proceeding. The previous proceeding will be discussed later. The 20 new millsite claims were located to cover the dwelling houses, other buildings and improvements, and tailings ponds; all of which had been placed on unappropriated public domain by the previous owners of the property. Swanson asserts that the millsite claims were located because the Forest Service cancelled a permit authorizing the use and occupation of the land. In 1975, Swanson executed a deed, that has not been recorded, conveying the property he acquired in 1960 and the claims he subsequently located to Livingston Silver, Inc., one of the contestees. Swanson is a shareholder and president of the corporation.

5/ This "Livingston" millsite is occasionally referred to as the "Big Livingston" to distinguish it from the other "Livingston" millsite, occasionally referred to as the "Little Livingston" which was the subject of the 1974 decision.

The improvements on the property are commonly known and referred to as the Livingston Mill. They were used in connection with a group of lode claims covering what is known as the Big Livingston Mine, and possibly in connection with a group of lode claims covering what is known as the Little Livingston Mine. The claims covering the Big Livingston Mine were located in 1882. Some rich lead and silver ore was reportedly shipped from the mine by packtrain. In 1922, a road was constructed to the mine and a 200-ton per day mill, a 3-mile aerial tram, and a hydroelectric powerplant were installed. By 1923, the property was in production. Production was fairly continuous until 1930. After 1930, the mine changed ownership several times; mining and milling equipment was removed, reinstalled, and some of it removed again. While production figures are not available for all years, it appears that between 1931 and 1951 the property produced at least 4,763 tons of ore. In 1951 and 1952, 60,000 tons of old mill tailings were rerun through a new mill on the property. Again, while production figures are not available for all years, it appears that there was little production from the property after 1952. The claims covering the Little Livingston Mine were located in 1884. Production records do not differentiate between the Big and Little Livingston Mines. It has been assumed that part of the early ore shipments credited to the Big Livingston probably came from the Little Livingston Mine.

There are two mills on the property. One is the old mill and it is essentially non-existent. It is situated on the Tram Terminal claim, which is involved in this proceeding. The other is the "new" mill and it is in operating condition. It was apparently constructed to process the tailings in 1951 and 1952. It is situated principally on the Trensvalle claim with a small portion extending onto the Deadwood claim. These two millsite claims were involved in the previous contest proceeding. Since Swanson acquired the property in 1960, the "new" mill has not been operated except for a 30-day test run in 1972. Swanson does, however, have 1,500 tons of ore on the property waiting to be milled. He does not want to mill it until he has resolved environmental disagreements with the Forest Service as to where the tailings should be deposited.

Swanson has been involved with the property since at least 1951 and 1952 when the tailings were run through the "new" mill. He was on the board of directors of the company that held the property and was at one time the president of the company. He had been putting up about 25 percent of the cash for the company to operate. The company encountered severe financial problems when he withdrew because of disagreements over methods of operation. This apparently resulted in Swanson's obtaining title to the property by the receiver's deed in 1960.

Swanson's efforts over the past 22 years have been directed to the location of new or protective claims, the rehabilitation

of some of the workings in the Big and Little Livingston Mines, the exploration for and development of mineralization in and around the two mines, the improvement of roads used in connection with the mines and the millsite area, the repair and reconstruction of some of the improvements on the millsite claims, the negotiation of agreements covering the operation of the property by various mining companies, and the fighting of adverse actions by the Forest Service. It is clear that Swanson has invested a good deal of time and money in attempting to place the mines and the millsite area in operating condition.

Swanson holds 23 millsite claims that are allegedly necessary for mining and milling operations in connection with the Big and Little Livingston groups of mining claims and for the reprocessing of old tailings found on certain of the millsite claims. Each of the millsite claims covers approximately 5 acres of land. Seven of the millsite claims were involved in the previous contest proceeding. Sixteen are involved in this proceeding. There is some disagreement between Swanson and a Forest Service mineral examiner as to which improvements are on which claims. I accept a map prepared by the Forest Service mineral examiner (Ex. No. 4) as correctly depicting the location of the improvements. The presently contested millsite claims, running from west to east, contain the following improvements and/or will serve, according to Swanson, the following functions in mining or milling operations:

The Park claim has a small concrete dam across Jim Creek, which was constructed about 7 or 8 years ago by Swanson. It replaces an earlier earthen and timber dam. There is a wooden box about 20 feet long to catch gravel before it goes through a pipeline into a turbine. The pipeline to the turbine is in the process of being constructed. It will replace an earlier dilapidated wooden pipeline. Swanson anticipates that the turbine will be used to develop hydroelectric power as a supplement for the present diesel power at the "new" mill. The improvements cover a fractional portion of the millsite claim.

The Parker claim has a ditch for the new pipeline from the dam on the Park claim to the Turbine on the Rene claim. The improvements cover a fractional portion of the millsite claim.

The Rene claim has an old turbine, a generator and control box. The equipment has not been operated since Swanson acquired the property. There is a ditch for the new pipeline from the dam on the Park claim to the turbine. There is an old powerline running from the generator to dwelling houses on previously contested millsite claims. There is a road that provides access to the turbine. There are springs and a ditch to carry water from the springs to an earthen dam on the Tramway No. 6 claim. The improvements cover a fractional portion of the millsite claim.

The Tram Terminal claim has the old mill and a portion of a small tailings pile. The tailings came from operations at the old mill. The old mill is virtually non-existent. It does, however, have functional wooden storage bins that can hold about 500 tons of ore. There is salvageable lumber in the mill. Swanson anticipates that the bins will be used to store high grade ore. He also anticipates that the tailings will be run through the "new" mill. The mill and the tailings cover a fractional portion of the millsite claim.

The Tramway No. 7 claim has a small pond formed by an earthen dam on the Tramway No. 6 claim that hold culinary water for the houses. The claim also has the old powerline from the generator to the houses, a portion of the small tailings pile found on the Tram Terminal claim, another even smaller tailings pile, the ditch from the springs on the Rene claim to the dam on Tramway No. 6 claim, and a road to the turbine. Swanson anticipates that the water from the pond will be used for both culinary purposes and as a source of warmer water for use in the mill during the wintertime. He also anticipates that both tailings piles will be run through the "new" mill. The improvements and the tailings cover a fractional portion of the millsite claim.

The Tramway No. 6 claim has a small earthen dam that forms the pond on the Tramway No. 7 claim, a pipeline that goes to the houses, a pipeline that goes to the "new" mill, presumably, the old powerline from the generator to the houses, a road that provides access to the turbine, another unidentified road, and a corner of one of the houses. The improvements cover a fractional portion of the claim.

The Livingston and Jim Creek claims are covered in part by a tailings pond and an unidentified road. The tailings pond resulted from operations at the old mill. Swanson anticipates that the tailings will be run through the "new" mill. He also anticipates that portions of the two claims will be used to leach material from the Deadwood mining claim which is a part of the Little Livingston group of claims. The tailings pond covers less than one-half of the Livingston claim and about two-thirds of the Jim Creek claim.

The Tramway No. 10 claim contains a road from the "new" mill. There are about 20 tons of ore stored on the claim. The improvements cover a fractional portion of the claim.

The Annex, Tramway, Tramway No. 2, Tramway No. 3 and Tramway No. 5 claims are covered in part by a tailing pond and an unidentified road. The tailings pond resulted from running a portion of the tailings on the Livingston and Jim Creek claims through the "new" mill in 1951 and 1952. Swanson anticipates that the tailings will again be run through the "new" mill. The tailings pond covers about one-half of the Annex claim, about

two-thirds of the Tramway claim, about one-half of the Tramway No. 2 claim and about one-third of the Tramway Nos. 3 and 5 claims.

The Tramway No. 8 and Tramway No. 9 claims are covered in part by a small tailings pond that apparently resulted from an overflow of the larger tailings pond on the Annex, Tramway, and Tramway Nos. 2, 3 and 5. There is also an unidentified road crossing the claims. Swanson anticipates that these tailings will again be run through the "new" mill. The tailings pond covers about one-third of the Tramway No. 8 claim and a small fraction of the Tramway No. 9 claim.

Swanson's present plans are to have the tailings on the Livingston and Jim Creek claims and the tailings on the Tram Terminal and Tramway No. 7 claims processed through the "new" mill with the resulting tailings being deposited in a cleared area on the lower claims, i.e., the Annex, Tramway and Tramway Nos. 2, 3, 5, 8 and 9. He then wants to process the present tailings on the lower claims through the mill and return the material to the lower claims. After processing the tailings, he wants to mine and mill ore from the associated mining claims and deposit the resulting material on the lower claims.

Swanson does not have the financial resources to operate the property and he has been attempting through the years to negotiate an agreement with a mining company to process the tailings and mine and mill ore from the associated mining claims. He has not had any success, at least in recent years, in interesting a mining company in the operation of the property. He attributes this to the fact that the Forest Service has been contesting his claims since 1968 and to the fact that environmental problems have been encountered and are anticipated with the Forest Service and State agencies.

In 1967, Swanson filed an application for a patent covering seven of his millsite claims, i.e., the High Tariff, Clara, Little Falls, Livingston, May, Trensvalle and Deadwood. The earlier Livingston claim is not the same as the Livingston claim involved in this proceeding. The seven millsite claims are contiguous and are virtually surrounded on three sides by the 16 millsite claims in this proceeding. They contain the "new" mill, the dwelling houses or camp, other buildings, a small portion of the tailings pond on the Livingston and Jim Creek claims and a small portion of the larger tailings pond on the lower claims, i.e., the Annex, Tramway and Tramway Nos. 2, 3, 5, 8 and 9.

Decision at 2-8.

As Judge Mensch recognized, it was unquestioned that if the mining claims associated with the millsites or the tailings ponds found on some of the millsites contained sufficient mineralization at the time of the withdrawal effected by SNRA and at the time of the hearing, at least some of the millsites were valuable and necessary for mining and milling operations. Accordingly, Judge Mensch reviewed, in extenso, the testimony relating to mineral values.

Government mineral examiner James J. Jones testified that he had taken a number of samples from two tailings deposits. On the extensive tailings deposit located on the Jim Creek and Livingston millsites a total of 27 samples were taken, while three more were taken from a much smaller area on the boundary between the Tram Terminal and Tramway No. 7 millsites. See Tr. 80-81, 103-04, Exh. 10. The samples taken from the Jim Creek and Livingston millsites averaged 2.63 ounces of silver and 3.24 percent lead per ton. 6/ The three samples from the tailings found on the Tram Terminal and the Tramway No. 7 averaged 1.46 ounces of silver and 2.41 percent lead per ton. As Judge Mensch noted, Swanson admitted that because of oxidation only 50 to 60 percent of the values could be recovered (Tr. 13). At the average metal prices for July 1981 ($ 8.63114 per ounce silver, 40.985 cents per pound lead), each ton of

tailings on the Jim Creek and Livingston millsites would have been worth $ 24.62, assuming 50 percent recovery. The samples from the

6/ Judge Mensch aggregated all 30 samples in his decision, with the result that the average values which he found where 2.526 ounces of silver and 3.16 percent lead per ton. See Decision at 12. Inasmuch as the deposits in question are clearly discrete, we feel that this was in error. The effect of Judge Mensch's approach was to understate slightly the values shown to exist on the Jim Creek and Livingston millsites and also to overstate the values present on the Tram Terminal and Tramway No. 7 millsites.

Tram Terminal and Tramway No. 7 had a value of $ 16.17, assuming the same 50 percent recovery rate. 7/

A very large old tailings deposit is also found extending from the Annex, through the Tramway, Tramway No. 2, Tramway No. 3, Tramway No. 5, Tramway No. 8, and slightly impinging on the Tramway No. 9. Five samples were taken from this pond (Exh. H). Reviewing the assay results, contestees' witness David Aro, a mining engineer, testified that, assuming the values were consistent throughout, the ore value would be approximately $ 15 per ton gross value (Tr. 149). Aro noted, "At that point you would have to review your milling costs very carefully and the nature in which those values were occurring, whether those mineral particles were oxidized, just how they occurred" (Tr. 149-50). Aro pointed out, however, that since milling the tailings would not require crushing and grinding, costs would approximate between $ 5 and $ 7 per ton (Tr. 150).

With respect to milling costs, Swanson testified that, based on 21 years experience, they would be approximately $ 15 a ton for mined ore (Tr. 12). Judge Mensch noted, however, that there was no evidence in the record as to the costs of loading the tailings, transporting them to the mill, and marketing them. Decision at 13.

7/ Actually, there are two tailings deposits involved here. One is relatively substantial and straddles the boundary of the Tram Terminal and Tramway No. 7. The other deposit, quite limited in areal extent, is totally located on the Tramway No. 7. Paradoxically, the highest values of the three samples were found in the one sample taken from the small deposit, viz., 1.8 ounces silver and 3.25 percent lead per ton. However, inasmuch as that little deposit would clearly be an insufficient basis upon which to show that the millsite was valuable for milling purposes, we have aggregated the values of the three samples (thereby effectively increasing the values for the larger deposit) for purposes of our analysis.

Finally, Judge Mensch took note of the values reputed to exist in the Big Livingston mine. Thus, an environmental assessment prepared in 1979 by a Forest Service mineral examiner had estimated that a 50,000 ton ore reserve existed on the Big Livingston mine with an estimated gross value of $ 3,750,250 at 1979 values (Exh. C at 11). Using July 1981 prices, the gross value had risen to $ 4,787,368. The average value would be $ 95.75 per ton. Noting that the evidence established that it would cost $ 20 a ton to mine and $ 15 a ton to mill, Judge Mensch computed the present net value of the 50,000 ton ore body at $ 3,037,500.

It is, of course, true that the Big Livingston mine is on patented ground. The importance of the Big Livingston mine to the instant case resides in the fact that, as Judge Mensch found, the best place to deposit the tailings would be on the large tailings ponds stretching from the Annex to the Tramway No. 9.

We have recited at length the facts relied on by Judge Mensch, even though they are not in substantial dispute, because they are critical to our ultimate resolution of the appeal. At this point, however, it is helpful if we focus on the primary aspect of the Government's case and the basis for its appeal, namely, the failure of contestees to commence actual commercial milling operations over a period of the last 21 years.

[1] Judge Mensch noted that nonuse through the years was virtually the sole basis of the Forest Service's case. He recognized that such nonuse can constitute a prima facie case, citing United States v. Zweifel, 508 F.2d

1150 (10th Cir. 1975); United States v. Hooker, 48 IBLA 22 (1980); United States v. Hess, 46 IBLA 1 (1980). But, Judge Mensch apparently felt compelled by past Board precedents to treat such a prima facie case as inherently weak. Thus, he quoted from United States v. Hooker, supra:

> "A case which is totally dependent upon the failure of a mining claimant to develop a claim [or presumably to use a millsite], is, a weak case at best", and little evidence is required to overcome the presumption which arises from non-development or nonuse.
>
> The millsite claimants had the burden of overcoming the prima facie case created by the presumption. As I read Hooker, this could have been done by virtually any evidence explaining the reasons for the nonuse of the millsites. The millsite claimants did not, as explained in Hooker, have the burden of establishing that the requirements of the law had been met and the millsite claims were valid at the time of the withdrawal and the time of the hearing, i.e., that a person of ordinary prudence would have been justified at both periods of time in occupying a part or all of the contested millsite claims with a reasonable expectation that the land was valuable and necessary for mining or milling operations.

Decision at 12. We believe that Judge Mensch has erred in this analysis as it applies to the facts of this case.

It is obvious that this Board's decision in United States v. Hooker, supra, has proved vexatious to a number of the Department's administrative law judges. In Hooker, the Board examined a statement of an administrative law judge advising a mining contestee that "[y]ou not only have to overcome whatever case they have, but even if you overcome the government's case, in addition to that you have to show that this is a valid, good claim, that you have a valid discovery under the mining laws." Id. at 26. The Board expressly rejected this statement as not in accord with the law. The Board declared:

> [D]ismissal of a contest complaint does not determine the validity of the claim, but merely establishes that, as to the issues raised in the hearing, the mineral claimant has preponderated. Thus, in a hearing on a Government contest complaint, there is no requirement that a mining claimant show that the claim is valid; rather, the mineral claimant's burden is to preponderate on the issues raised by the evidence. [Emphasis in original.]

Id. at 26-27.

The Board's decision was premised on the distinction between a finding that a discovery exists and a finding that the claim is valid. In the normal Government contest which alleges that a mining claim is invalid by reason of the lack of discovery of a valuable mineral deposit, the factual dispute turns on the question of discovery. If the Government is successful and establishes that no discovery exists, the claim is necessarily invalid, since discovery is a prerequisite to claim validity. The converse, however, does not obtain. In other words, the fact that a discovery has been shown to exist does not necessarily establish the validity of the claim, since discovery is merely. one element of a claim's ultimate validity.

This is particularly true where the issues joined at the hearing involve merely one aspect of discovery, e.g., locatability or marketability. A case involving a 1980 placer location of pumice might well be initiated solely on the charge that pumice is a common variety mineral and as such was removed from location by the Common Varieties Act, § 3 of the Act of July 23, 1955, 69 Stat. 368, as amended, 30 U.S.A. § 611 (1982). If, at the hearing, the contestee showed by a preponderance of the evidence that the located pumice was actually "block pumice," and, as such, expressly excepted from the Common

Varieties Act, the correct course of action would be to dismiss the contest complaint. It would not be proper to declare the claim "valid." Whether or not the block pumice was marketable or whether a prudent man would be justified in expending his time or effort in developing a paying mine had not even been examined. One could say that the claim was not invalid based on the evidence presented, but one could not say that the evidence demonstrated that the claim was valid.

Indeed, this was the essential holding of United States v. McElwaine, 26 IBLA 20 (1976), where we held it improper to invalidate a claim on the basis of the existence of excess reserves 8/ where the contest complaint had only charged that there was insufficient quantity and quality of the mineral located to constitute a discovery. In that case, which involved a patent application, the Board did not find the claims valid but rather afforded the Forest Service 60 days in which to file an amended complaint. 9/

In retrospect, it is now clear that the sentence which we expressly rejected in Hooker may have contained the seeds for subsequent confusion. As noted, it required a claimant to "show that this is a valid, good, claim, that you have a valid discovery under the mining laws." Our objection was

8/ The viability of a contest complaint based on a charge of excess reserves or, alternatively, on the charge that the land is not mineral in character is examined at length in United States v. Oneida Perlite Corp., 57 IBLA 167, 88 I.E. 772 (1981).

9/ It should, of course, be noted that this Board has distinguished between the practical consequences which flow from a dismissal of a contest complaint which does not involve a patent application and one which does. See United States v. Taylor, 19 IBLA 9, 82 I.E. 68 (1975). Had no patent application been present in McElwaine, the Board would merely have dismissed the contest. It would not, however, have found the claims to be valid.

focussed on only the first part of this analysis: the statement that a contestee must show that he had a valid, good claim. Unfortunately, it seems apparent that our decision was amenable to the interpretation that a claimant need never show that a discovery exists. This, we did not intend.

If the Government presents a prima facie case of no discovery, a claimant must overcome this showing by a preponderance of the evidence. But, as a matter of evidence, if the Government's case is solely dependent upon one element of discovery, e.g., the locatability of the claimed mineral, the burden of preponderating is carried where the contestee presents probative evidence that the mineral is locatable under the mining laws sufficient to overcome the evidence presented by the Government. In such circumstances, the contestee need present no evidence that the mineral exists in sufficient quantity and quality to justify future labor and expenditures unless the Government has, itself, presented sufficient evidence on this point to put the matter in controversy. See United States v. Pool, 78 IBLA 215, 220 (1984). 10/ But we never intended that, where the evidence puts the question of discovery in issue, the contestee need not overcome that showing.

This problem relating to the proper interpretation of United States v. Hooker, supra, was exacerbated in the instant case by the fact that claims involved herein were millsite claims. Judge Mensch adverted to this Board's holding in United States v. Hess, supra, that while evidence of nonproduction

10/ It must be pointed out, however, that should the contest complaint allege the absence of sufficient mineralization and the contestee present sufficient evidence to show that the mineralization is, indeed, insufficient, the claim will be declared invalid even though the Government has presented no evidence at all on this point. United States v. Pool, supra.

from a mining claim over a sufficient period of time is sufficient, by itself, to establish a prima facie case, such a case "is the weakest that the Government can establish" and "the assertion by a mining claimant of a reasonable justification for a nondevelopment would defeat the presumption." 46 IBLA at 9. The problem is that Judge Mensch implicitly assumed that the same analysis could be applied to millsite claims and accordingly held that little evidence was needed to overcome the presumption which arises from nondevelopment or nonuse of a millsite. Decision at 11-12. This is not correct.

The critical distinction between a mining claim and a millsite on this point arises from the nature of these disparate claims. By statute, a mining claim generally can be said to be valid when it embraces a discovery of a valuable mineral deposit. Having once made such a discovery, the claim can be held indefinitely against the world so long as the annual assessment work is performed (30 U.S.A. § 28 (1982)), the recordation provisions are complied with (43 U.S.A. § 1744 (1982)), and a valuable mineral deposit continues to exist. The continued validity of the claim is, thus, not dependent upon actual production from the claim. This being the case, when the Government's prima facie case is based solely on the lack of production over an extended period of time, little evidence is necessary to overcome the presumption of invalidity.

Millsites, however, proceed upon a substantially different legal basis. The statutory grant of nonmineral lands for millsites is expressly limited to land "used or occupied * * * for mining or milling purposes." 30 U.S.A. § 42 (1982). The essence of the millsite appropriation is use or occupancy. When

the Government presents a prima facie case that the millsite has not been used or occupied for a significant period of time, this is not a weak prima facie case. Rather, it is akin to a prima facie case in a mining contest wherein the Government has presented substantial probative evidence that no valuable mineral deposit exists within the challenged location. This is a prima facie case which goes to the core of the claim's validity.

So, too, in the case of a millsite contest where the evidence presented by the Government is sufficient to establish a prima facie case that the land has not been used or occupied for mining or milling purposes, such evidence goes to the very heart of the millsite's validity. It goes without saying that such a prima facie case might be overcome by evidence presented by a contestee. But, when such a prima facie case has been presented, the contestee has an affirmative obligation to establish by a preponderance of the evidence that the challenged millsite claims are either used or occupied for mining or milling purposes. See, e.g., United States v. Swanson, 14 IBLA at 180, 81 I.E. at 25.

[2] A more difficult situation arises, however, where the Government's evidence merely establishes that the millsites were not used but arguably were, either in whole or in part, occupied for mining and milling purposes. While "use" under 30 U.S.A. § 42 (1982) necessarily implies present mining or milling activities, it has long been noted that land may be "occupied" under the statute even in the absence of present "use" of the land for mining or milling purposes. The question, of course, is how to determine the validity of a millsite claim if there is no present use.

As far back as Charles Lennig, supra, the Department held that, in the absence of actual use of the land for mining or milling purposes, the claimant must show "an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes." However, other Departmental decisions have also noted that "the mere intention to use land for mining and milling purposes some time in the future is not sufficient to validate a location." United States v. Herron, A-27414 (Mar. 18, 1957). As the Board suggested in United States v. Cuneo, 15 IBLA 304, 81 I.E. 262 (1974), "The concept of time also comes into play in considering the nonuse of the millsites." Id. at 324, 81 I.E. at 271. The Board continued:

> In considering the issue of occupancy of a millsite which is not being used, we must apply a test of reasonableness to determine whether the period of nonuse demonstrates invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; the marketing conditions; the costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on the site. [Footnote omitted.]

Id. at 326-27, 81 I.E. at 272-73.

Admittedly, since Cuneo involved an independent millsite the elements listed were directed primarily to that type of situation, and different elements would, we believe, properly be considered relevant for a dependent millsite: the validity of the claim, if unpatented (United States v. Larsen, 9 IBLA 247 (1973)); the extent of mineral reserves on a patented claim (cf. United States v. Skidmore, 10 IBLA 322 (1973)); the length of nonuse and

the amount of time that might reasonably be expected to be consumed in putting the millsites to use. Included herein would be the reasonable extent of use consistent with the scope of foreseeable activities. United States v. Swanson, supra. A claimant's stated intent or his mere willingness to expend time and effort in developing one or more millsites cannot substitute for objective evidence that the purposes of the millsite law have been accomplished.

The dissent, while ostensibly bowing in the direction of weighing a multitude of factors, essentially argues that all of the millsites in issue are invalid solely because of the fact that in the 21 years which Swanson has owned the claims production from the mill has never occurred, save for a single 30-day test run in 1972 (Tr. 11-12). While we agree that such a period of time is a proper component of the test we must apply, we cannot accept the view that it should be, by itself, conclusive, particularly in light of Swanson's explanation of the reasons for his failure to commence actual mining or milling operations. Moreover, the dissent's assertion that the Board's 1974 decision was based on the mistaken belief that the mill had commenced production in 1972 is not borne out by an analysis of that decision. 11/ In any event, even if it could be assumed that the Board's

11/ Thus, the Board had noted that, "The Judge concluded, and we agree, that the evidence demonstrated a good faith intention to use some of the land within the contested millsites for mining purposes." 14 IBLA at 171, 81 I.E. at 20 (emphasis in original). That the Board found this conclusion relatively clear is made manifest in its decision. Thus, immediately after its affirmance of Judge Mensch on the question of the existence of a good faith occupation and use of "some" of the millsites, the Board proceeded to examine what it termed the "major problem in this case," i.e., "the Government's second contention that more land was located than actually needed for mining and milling purposes." Id. In this regard, the ease with which the Board decided the good faith use and occupancy in favor of Swanson merely echos

earlier decisions were solely premised on a mistake of fact that the mill had commenced production in 1972, the Board implicitly accepted an 11-year hiatus in production in those decisions.

The other cases cited by the dissent also do not support its position. Thus, while this Board noted that more than a decade of nonuse of the land within an independent millsite for milling purposes had occurred in United States v. Cuneo, supra, the decision of the Board in that case emphasized that the millsite was not then operable and further that the totality of the evidence "establish[es] the economic infeasibility of a renewed milling operation on the site." Id. at 328, 81 I.E. at 273. The decision in United States v. Werry, 14 IBLA 242, 81 I.E. 44 (1974), issued 2 weeks after United States v. Swanson, supra, involved a millsite where there was neither use nor improvements on the land. The decision in United States v. Herron, supra, involved a millsite with no improvements thereon, which had only been used to remove tailings deposited on the land years earlier. The decision noted that the millsite claimants had no lode or placer mining claim and, therefore, the millsite claim could not qualify as a dependent millsite. Moreover, since the claimants owned no improvements on the claim and had only a vague plan for possibly building a mill in the future, the location clearly could not qualify as an independent millsite claim. Both of these decisions are

fn. 11 (continued)
Judge Mensch's conclusion therein that "I do not see how any reasonable person could conclude on the basis of the evidence presented that the millsites are invalid for the reasons specified in the complaint." (Decision at 13.) In any event, a reading of the Board's entire decision makes it clear that its affirmance of Judge Mensch on this point was primarily occasioned by the showing of past use and occupancy of the claims for mining and milling purposes and was not, as the dissent argues, solely dependent upon the commencement of milling operations in 1972.

based on facts which bear scant resemblance to those described in the instant case.

Herein, the record is replete with examples of improvements which Swanson has placed on some of the millsite claims over the years. Indeed, his testimony is uncontradicted that the mill on the Trensvalle millsite has a replacement value of $ 1,500,000 (Tr. 46). Swanson has expended over $ 250,000 simply on road construction and has stated that the total amount expended would aggregate several million dollars (Tr. 38). Considering all the claims, they contain a total of 26 usable structures not including tailings ponds, dams, and the like. 12/ The dissent suggests that we disregard all of these indicia of good faith solely because 21 years have passed since Swanson acquired the claims and he has yet to go into production. Yet, the dissent fails to give any credence to Swanson's explanations as to why he has not gone into production.

As Swanson noted, it is often difficult to get outside parties interested in investing in properties within the SNRA. Considering the rigorous regulations which limit operations within the SNRA, this is scarcely surprising. Indeed, this Board has recognized that obtaining investment capital for unpatented mining claims is a problem common to many "since both individuals and lending institutions are often reluctant to invest great funds in a mining venture in the absence of a patented mining claim." United States v. Williamson, 45 IBLA 264, 285, 87 I.E. 34, 46 (1980). This observation has significantly greater force in the instant case where the validity of Swanson's

12/ See note 18, infra.

claims have been subject to challenge by the Forest Service since 1971. Rash, indeed, would be the outside investor who would commit large amounts of capital to a venture in such circumstances. 13/ A review of the evidentiary record, in light of the exigent practicalities of the situation, supports the conclusion that, at least insofar as certain claims or parts thereof, Swanson has shown "an occupation, by improvements or otherwise, as evidences an intended use of the tract[s] in good faith for mining or milling purposes." Charles Lennig, supra. We will now turn to an analysis of the individual claims at issue, with due regard both to the Forest Service's complaint that Judge Mensch's decision is inherently unworkable and to the contestees' argument that they should have received all of the land in all of the millsites.

In his decision, Judge Mensch ruled that, though contestees had overcome the Government's prima facie case as to invalidity of all of the claims, the evidence also established that the claims covered more land than is reasonably needed for mining and milling purposes. Accordingly, he held the following portions of the contested millsites invalid:

> The Park claim -- all land except that needed for the dam and the pipeline from the dam to the turbine. * * *
>
> The Parker claim -- all land except that needed for the pipeline from the dam to the turbine. * * *
>
> The Rene claim -- all land except that needed for the pipeline from the dam to the turbine, for the turbine and associated equipment, for the powerline from the generator, for the

13/ Indeed, the Forest Service has noted that "[a]lthough some properties have lain idle for years or even decades, most economically marginal mining properties will some day become minable." USDA Forest Service Technical Report INT-35 (1983), at 55. Among the causes advanced as deterring production are "unfavorable legislation or regulations," "threat of litigation," and "lack of capital." Id.

springs and for the ditch from the springs to the lower earthen dam. * * *

The Tram Terminal claim -- all land except that occupied by the old mill and the tailings pond. * * *

The Tramway No. 7 claim -- all land except that needed for the pond, the powerline from the generator, the ditch from the springs to the lower earthen dam and that occupied by the two tailings piles. * * *

The Tramway No. 6 claim -- all land except that needed for the earthen dam, the pipelines from the dam and the powerline from the generator. * * *

The Livingston and Jim Creek claims -- all land except that occupied by the tailings pond. * * *

The Tramway No. 10 claim -- all of the land. * * *

The Annex, Tramway, Tramway Nos. 2, 3, 5, 8 and 9 claims- all land except that occupied by the tailings ponds.

Decision at 15-16.

The Forest Service contends in essence that (1) all of the claims should be declared invalid; (2) failing in that, some of the millsite claims are used for purposes not within the scope of 30 U.S.A. § 42 (1982); and (3) while in agreement with Judge Mensch's conclusion that only those parts of the claims actually needed by the contestees are properly located within millsite claims, the method Judge Mensch used in describing these portions "set up an unworkable administrative system" that is "ambiguous and not practical" (Statement of Reasons at 4). Contestees, on the other hand, argue that all of the land in all of the claims is needed and, therefore, Judge Mensch erred to the extent he declared any part of the millsite claims null and void.

We have already indicated our agreement with Judge Mensch's conclusion that, to the extent the invalidity of all of the millsite claims was premised solely on the failure of the claimants to begin actual commercial milling operations over the past 2 decades, Swanson overcame that showing. However, the question whether each individual millsite claim was used or occupied for mining and milling purposes in 1972 (the date of the SNRA withdrawal) and at the time of the hearing, requires a somewhat more extensive analysis of both the law and legal precedents relating to 30 U.S.A. § 42 (1982) and the facts adduced at the hearing. Consistent with Judge Mensch's approach, we will analyze the claims from west to east. With regard to contestees' general assertion that they "need" all of the land within all of their millsite claims, it is sufficient to note that, absent either present use or occupancy of each claim under 30 U.S.A. § 42 (1982), contestees' perceived needs are irrelevant as they have failed to validly appropriate the land within the claims. Since the land has been withdrawn from further location, the possibility of future use or occupancy is equally ineffective to validate these claims in futuro. What must be shown is present use or occupancy of each of the claimed millsites.

[3] Five of the six millsite claims lying west of the High Tariff are alleged to be needed for storage and conveyance of water to the mill on the Trensvalle and for providing water for consumption purposes on those millsite claims containing living quarters. 14/ These five claims are the Park, Parker, Rene, Tramway No. 7, and Tramway No. 6 millsites.

14/ We agree with Judge Mensch that the Government's exhibit 4 fairly represents the placement of structures in relationship to the specific millsites.

Insofar as the dam on the Park millsite is concerned, we think the decisional law is relatively clear that, though mere appropriation of water does not validate a millsite (Iron King Mine & Mill Site, 9 L.D. 201 (1889)), where water is essential for the working of the mine or an associated millsite, works required in the development of the water therefor are properly embraced in a millsite (Sierra Grande Mining Co. v. Crawford, 11 L.D. 338 (1890)).

The same, however, is not true for the pipelines or ditches which conduct the water to the mine or mill. Section 9 of the original Mining Act of 1866 confirmed the right to use water for mining purposes as recognized by local customs and laws and expressly acknowledged and confirmed the "right of way for the construction of ditches and canals" for purposes associated with mining and milling. See 30 U.S.A. § 51 and 43 U.S.A. § 661 (1970) (repealed by the Federal Land Policy and Management Act of 1976). See generally Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982).

Thus, the mining laws clearly contemplated that use of federal land would be necessary in order to conduct water from its source to a place of beneficiation, and granted a right-of-way for that purpose. This being so, there is no logical basis upon which it could be concluded that Congress also intended that a millsite could be predicated on the same use of the land for which it had expressly granted a right-of-way. Early Departmental adjudications bear this out.

Cases such as Satisfaction Extension Mill Site, 14 L.D. 173 (1892), and Gold Springs & Denver City Mill Site, 13 L.D. 175 (1891), while recognizing

that millsites could validly embrace pumping stations and other such structures, distinguished holdings in earlier cases, such as Charles Lennig, supra, and Mint Lode & Mill Site, 12 L.D. 624 (1891), which had rejected millsites embracing a ditch conveying water, by arguing that in those cases there was only the "mere use of water," whereas in the later cases the millsites were improved and used in connection with the mine. In Ash Peak Mining Co., 47 L.D. 580 (1920), while the First Assistant Secretary held certain millsites valid, these millsites clearly did not embrace over 1-1/4 miles of pipeline laid from the water source to the mine. We have failed to find a single case in which a millsite claim was granted for the sole purpose of conveying water through ditches or pipes.

In light of both the statutory scheme and the Departmental pronouncements, we think it clear that a millsite claim is not properly made for the sole purpose of conducting water from one place to another, even if the water is used in connection with mining or milling operations. Thus, the Parker claim, which has no other improvement save the irrigation ditch, cannot be sustained. By the same token, the dam on the west half of the Park claim is the only qualifying improvement located thereon on that claim.

While the Rene claim contains a turbine and springs, these may not be used to validate the claim. As the Forest Service noted, the record establishes that the turbine is not useable and the generator was not added until relatively recently (Tr. 24-25, 97). Thus, since the land was withdrawn from further appropriation under the mining laws on August 22, 1972, 16 U.S.A. § 460aa-9 (1982), improvements constructed after that date could

not serve to retroactively validate the Rene. To the extent that Swanson now wishes to use a turbine on the Rene, we believe he must obtain a special use permit. Insofar as the springs which are used for drinking purposes are concerned, since there is no indication that they have been improved, they cannot serve as the basis for a valid millsite.

Similarly, Swanson has not established that improvements exist on the water supply developed on the Tramway No. 6 and No. 7, beyond an earthen dam in the eastern portion of the Tramway No. 7 (Tr. 27).

With respect to the Tram Terminal millsite, it is clear that, insofar as actual milling is concerned, the old mill is worthless. Swanson argued that it was useful for storage of ore (Tr. 20-21, 50), but the Government testimony was clearly to the effect that not only had it not been so used, but that further road construction would be necessary to make it usable (Tr. 74, 100-01). The use of these bins for storage is thus not only hypothetical, but involves the exact problem which troubled the Board in its initial adjudication in 1974: how much land could reasonably be used for ore storage. We do not believe that Swanson can establish the validity of this millsite based on anything to do with the old mill, particularly since the Board granted the northern portion of the May and Deadwood millsites to accommodate ore storage in its second decision, and Judge Callister found that the Board "took into account the need for storage space for milling ore" in granting the northern parts of the May, Trensvalle, and Deadwood millsites. See Swanson v. Andrus, supra at 5.

[4] This, however, leads us to the question of the tailings, which appear not only on the south boundary of the Tram Terminal millsite but also along the north edge of the Tramway Mo. 7. Since, with the exception of the Tramway No. 10 which Judge Mensch invalidated, all of the remaining claims have tailings thereon, it is appropriate to now address the tailings issue.

Since Charles Lennig, supra, the storage of ore and the depositing of tailings have been recognized as valid uses of millsites. A caveat, however, was emphasized in cases such as United States v. Herron, supra, that, where millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and that the tailings have a direct relationship with the vein or lode with which the millsites are associated. Thus, Judge Mensch's findings as to the economic value of the tailings are of considerable import.

It is, of course, admitted that the Government mineral examiners testified to the substantial values disclosed in their sampling of the tailings on the Jim Creek and Livingston millsites. See Tr. 104, Exh. 10. However, the values disclosed by the three samples taken from the Tram Terminal and the Tramway No. 7 evidence somewhat lower values. Assuming continuity of these values, recoverable values per ton would be $ 16.17. We note, however, the uncontradicted testimony by Aro was that milling costs for tailings would range between $ 5 and $ 7 per ton. While, admittedly, no cost figures were provided relating to transportation and marketing, it remains likely that at the July 1981 prices, the tailings could be milled at a profit.

We recognize, of course, that during the period of time that this case has been pending before the Board the price of silver has declined and the value of lead has dropped precipitously. Particularly in reference to the two small deposits on the Tram Terminal and the Tramway No. 7, the present feasibility of milling operations has grown increasingly speculative. However, we hesitate to hold that a prudent man would not have a reasonable expectation based on present facts in light of historic price and cost factors (see In re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.E. 352 (1983)) of milling these deposits at a profit absent evidence that the price declines in these minerals are of a long-range structural nature.

A similar problem exists with the large tailings deposit found in the Annex through the Tramway No. 5 millsites and the smaller spillover pond on the Tramway Nos. 8 and 9 millsites. Aro estimated that the value per ton as shown by the few samples taken was $ 15 at July 1981 prices for the large pond. However, this was the gross value and, if it is assumed that oxidation would limit recovery to between 50 and 60 percent, as indicated by Swanson in reference to the tailings deposit on the Jim Creek and Livingston millsites, recoverable values would be roughly $ 8.25, perilously close to the costs associated with simply milling, much less the added, though unspecified, costs of transportation and marketing. Moreover, without doubt, the tailings could not be profitably milled at present mineral prices. There was evidence introduced by contestees that these tailings might be amenable to a leaching process (Tr. 166-67). But not only was such testimony speculative as of the time of the hearing, there was absolutely no evidence that the possibility of leaching these old tailings was even contemplated when the land was withdrawn

in 1972. 15/ Modern speculation of a possible future mode of economically beneficiating this tailings deposit cannot establish that, as of the date of withdrawal in 1972, these millsites were used or occupied for mining or milling purposes.

In any event, it seems clear that contestees' main desire for these millsites is related to a desire to use them for tailings disposal. See Tr. 48-49. Swanson testified to the expenditure of $ 15,000 to raise the dikes to improve the large tailings pond in 1975 (Tr. 31). We believe that such activities together with Swanson's substantial expenditures in opening tunnels in the Big Livingston mine show a sufficient good faith occupation of that part of the Annex through Tramway No. 5 millsites so as to overcome the Forest Service's prima facie case of invalidity. However, Swanson's attempt to appropriate additional land on the Tramway Nos. 8 and 9 millsites is both excessive and unjustified on the record before us. To the extent that Judge Mensch granted contestees any land within these two millsites it is hereby reversed.

Insofar as the Tramway No. 10 is concerned, we agree with Judge Mensch that there is simply no evidence of any present use or occupancy of the land therein, either at the date of the hearing or in 1972, to justify that millsite claim.

15/ In fact, the only evidence relating to past efforts to ascertain the suitability of the deposit for heap leaching was that Swanson had determined that it could not be done (Tr. 13).

[5] Having individually examined all of the millsite claims, it is now necessary to examine one of the Forest Service's major complaints -- that the method by which Judge Mensch invalidated parts of the various millsite claims is essentially unworkable. Contestees join the Forest Service in criticizing this aspect of Judge Mensch's opinion.

While we recognize the problems which confronted Judge Mensch, who was faced with a situation in which there were a number of millsite claims aggregating 5 acres wherein only a small portion thereof was actually used for millsite purposes, we must agree that the solution he formulated is unworkable. Judge Mensch was, of course, on sound legal footing in upholding the authority of the Department to declare acreage within a millsite claim to be excessive, giving due consideration to the use to which the millsite was put. Not only does the statute grant only land actually used or occupied not to "exceed five acres," 30 U.S.A. § 42 (1982), but, in addition, the Department's authority to invalidate portions of millsites was expressly upheld by Judge Callister in his decision. See Swanson v. Andrus, supra at 5. The question, then, is how should this authority be implemented.

It is our view that, as a general matter, where the United States is examining individual millsites for the purpose of ascertaining whether all of the land within the millsite is either used or needed for mining and milling purposes, such scrutiny should be limited to each 2-1/2 acre aliquot part. 16/ The essential justification for this approach lies in practical considerations.

16/ Of course, in certain cases it might also be practical to require a claimant to redescribe differing portions of multiple millsites into a

Carried to its logical culmination, an approach limiting the land which could be claimed under 30 U.S.A. § 42 (1982) to only the land actually used or occupied would be virtually impossible to implement. To take but one example, as examined infra, the High Tariff millsite has nine separate structures within its boundaries. How much of the land in the millsite is actually used or occupied? Is it limited to the actual situs of the structures, or a "reasonable" area adjacent to each, or the area between each but not extending beyond the furthest in any specific direction? We do not believe that any real purpose would be served by attempting to delineate with exactitude, even if it were possible, the specific areas within each millsite which are used or occupied, particularly where, as here, the claims may not go to patent. Rather, prudence suggests that we confine our review of the extent of the use or occupancy to consideration of whether each 2-1/2 acre portion of these 5-acre millsites show the element of either use or occupancy in conformacy to the statute.

A similar practical approach has been followed in determining whether land within placer mining claims is mineral in character. Thus, the Department does not require that a mining claimant show that each acre of land is mineral in character. Rather, it merely requires a mineral claimant to show that each 10-acre subdivision is mineral in character. -17/ In affirming this

fn. 16 (continued)
single millsite and thereby effectuate the same purpose of including within the location land actually used or occupied for mining or milling purposes and excluding other lands which are not so used or occupied. This is the approach which we have adopted for the two tailings deposits on the Tram Terminal and the Tramway No. 7, supra.

17/ The Board has held that in determining whether each 10-acre part of a claim is mineral in character, the claim should be subdivided so as to create square 10-acre parcels, to the extent possible. See United States v. Lara

test, the Ninth Circuit Court of Appeals noted the 10-acre figure was justified for the simple reason that "since Federal land is platted in ten-acre tracts, ten acres is a reasonable unit." McCall v. Andrus, 628 F.2d 1185, 1188 (1980), cert. denied, 450 U.S. 996 (1981). We think it is equally "reasonable" in the instant case to limit the scope of the necessary showing to each 2-1/2 acre aliquot part of these 5-acre claims.

With this in mind, and in light of our specific holdings above, we make the following findings. Inasmuch as the dam on the west half of the Park claim is the only qualifying improvement, the east half must be deemed null and void. No qualifying improvements exist on either the Rene or Parker millsites and they are both hereby declared null and void in their entirety. The only qualifying improvements on the Tram Terminal, the Tramway No. 7, and the Tramway No. 6 are the two tailings deposits in the north part of the Tramway No. 7 and south part of the Tram Terminal and the dam for drinking water along the boundary of the Tramway No. 7 and Tramway No. 6. Contestees are directed to redescribe a single 2-1/2 acre site embracing the tailings and another 2-1/2 acre site embracing the dam and impounded water. All other land within these millsites is declared null and void.

With respect to the Jim Creek and Livingston claims, the contest against them is dismissed in its entirety. Similarly, the contest is dismissed as to the Annex, Tramway, and Tramway No. 2 millsites. With respect to the Tramway Nos. 3 and 5, inasmuch as the tailings pond occupies only land

fn. 17 (continued)
(On Reconsideration), 80 IBLA 215 (1984), aff'd, Lara v. Secretary of the Interior, Civil No. 84-1272-PA (May 1, 1986).

in the south half of these millsites, the contest is dismissed as to the south halves thereof, but the north halves are declared null and void. As noted earlier, the Tramway Nos. 8, 9, and 10 are declared null and void in their entirety.

Finally, with reference to the four claims which were remanded to the Department by the District Court, viz., the High Tariff, Clara, Little Falls, and Livingston millsites, we think the Court was clearly correct in its conclusion that the earlier decision of the Board failed to make adequate provision for housing a work force. Accordingly, we grant Swanson the High Tariff and Clara millsites. These two millsites and the attendant structures found thereon provide more than sufficient living quarters. 18/ We find the Little Falls and Livingston millsites to be invalid in their entirety. Swanson is, of course, at liberty to move the six structures found on those claims to the high Tariff or Clara, where there is more than sufficient room

18/ The Board's decision in United States v. Swanson, supra, recited the factual findings which Judge Mensch had made as to the improvements found on the millsites or the uses to which they had been put:

"High Tariff - Manager's House, assay office, office, bunkhouse, two storage buildings, a school, two unidentified buildings, and connecting roadways.
"Clara - Eight separate structures identified as living quarters, an unidentified building and connecting roadways.
"Little Falls - Five separate structures identified as living quarters, storage of ore and connecting roadways.
"Livingston - One structure identified as living quarters, storage of ore, a bridge and connecting roadways.
"May - Tailings pond, storage of ore and connecting roadways.
"Trensvalle - Ball and flotation mill, crusher, shop, tank, tailings pond, storage of ore and connecting roadways.
"Deadwood - Tailings pond and connecting roadways."

14 IBLA at 168, 81 I.E. at 18-19. Swanson received those parts of the May, Trensvalle, and Deadwood millsites containing improvements in the Board's 1978 decision.

to locate them, if he feels he needs work quarters in addition to those already found on the High Tariff and Clara.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Mensch is affirmed as modified in part and reversed in part.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

Despite the amount of time spent in gathering evidence concerning these millsites, another hearing is needed to permit resolution of the complex issues which the successive adjudications have created in this case. This appeal is comprised of two separate prior proceedings. The first, a 1982 Federal court's remand order, concerns four of seven original millsite claims where a mill and service buildings are located, for which patent was sought in 1967, and concerning which a hearing was held in 1972. The second proceeding involves a peripheral group of 16 claims which were the subject of a 1981 Forest Service contest hearing, the 1982 decision of which has been appealed to this Board. The four original claims are before this Board, by the terms of the order of remand, for a determination of the amount of land actually necessary for milling operations conducted on the claims. The issue of the validity of the 16 peripheral millsite claims located around the original group must now also be determined following appeal by the parties from a 1982 decision by Administrative Law Judge Mensch. The challenge to the validity of some of those claims is rejected by the majority based upon a finding that claimants have shown they have occupied parts of the millsites for milling purposes by a preponderance of the evidence at hearing. This is an error. To the extent that claimants' case rested upon a showing that parts of the millsites were occupied in good faith for milling purposes, a rehearing is needed to clarify the status of the claimants' occupancy and the factual basis for that occupancy. To the extent claimants' case rests upon actual use of some of these millsites for storage of ore prior to shipment, a rehearing is required to identify the location and extent of such use.

The transcript of the 1981 hearing before the Administrative Law Judge reveals that this Board's decision in United States v. Swanson, 14 IBLA 158, 81 I.E. 14 (1974), which considered the seven original claims, relied upon the erroneous assumption these central millsites were actually being used for milling operations in 1972. The prior Swanson decision recites, at 14 IBLA 166, 81 I.E. at 18, that "all seven [millsite claims] are now being used to some degree in connection with the patented lode mining claims known as the Livingston Mine." This observation by the Board is later explained to have been based upon testimony given by Swanson at the 1972 hearing, where the 1974 decision recites he testified to the effect that:

> On April 24, 1972, after initiation of this contest but before the hearing, Swanson entered into a lease-purchase agreement with Mine Developers, Inc., an experienced mining concern. In April of 1972, the company sent a crew of men to the property to work on the mill and other facilities on the millsites. Swanson testified that under this agreement the Livingston Mine and the seven millsites are presently being operated for mining and milling purposes.

Id.14 IBLA at 167, 81 I.E. at 18. Finally, after considering the attack made upon the validity of the claims by the Forest Service, to the effect that the millsites were not actually being used for mining and milling purposes, the 1974 Board concluded:

> Appellant invested a considerable sum of money in acquiring his mining and milling properties and spent a number of years devoting labor and means to reconditioning the Livingston Mine and extracting and stockpiling millable ore. In 1972, appellant entered into a lease-purchase agreement with Mine Developers, Inc., in order to further exploit the worth of his mine and millsites. The Livingston Mine is now operative and the flotation mill above Jim Creek on the Trensvalle millsite has been put into production. The Judge concluded, and we agree, that the evidence

> demonstrated a good faith intention to use some of the land within the contested millsites for mining and milling purposes. [Emphasis in original.]

Id. at 14 IBLA 171, 81 I.E. at 20.

The conclusion, therefore, that the mill was not only operating, but was in production, was central to the Board's finding in 1974 that portions of the millsites were being used to some extent "for mining and milling purposes." In such a case, at least the land upon which the mill was located was being used. It was not necessary, given the Board's acceptance of actual, ongoing production, to give detailed consideration to the effect of the claimants' occupation of other parts of the premises, except to the extent that the Forest Service contended other usage, not connected with mining and milling, was taking place on some millsites.

Swanson's failure to respond to the 1974 Board's directive that he redescribe his claims to bring them into compliance with the mining law resulted in a later Board decision invalidating the four claims which the district court's decision has now remanded for further consideration. See United States v. Swanson, 34 IBLA 25 (1978); Swanson v. Andrus, Civ. No. 78-4045 (D. Idaho, Jan. 3, 1982). It has now become apparent, however, that the assessment of the facts made by the 1974 Board was mistaken. In fact there had been no production on the millsites since some time prior to 1960. The mill was not in production in 1972, contrary to the Board's finding, and has not produced any marketable commodity since prior to 1960. Thus, the basic premise upon which the initial decision by the Board was

founded is false. The subsequent review conducted by the Federal district court was also grounded upon the same mistake, since it was premised upon an acceptance of the Board's basic error of fact. The district court's opinion, therefore, like the 1974 Board decision, assumes that the claims are valid, generally, without discussion. But this easy acceptance is deceptive, being founded as it is, upon error.

It appears this factual error arose when the 1974 Board accepted uncritically Swanson's predictions of successful continued development of his property by Mine Developers, Inc., at the 1972 hearing. The actual event, as later described by the evidence at the 1981 hearing, was quite different. At the 1981 contest hearing, Swanson testified that the mill had not been run since it was acquired by him in 1960, except for a 30-day test run in 1972 (Tr. 11, 12). This test revealed the "results were too low," according to Swanson, and as a consequence the mill was shut down and has not run since (Tr. 12).

From the hearing transcript it is not possible to tell whether the 30-day test was made on mill tailings, on ore extracted from the mines, or on a combination of both. What is clear, however, is that the test was followed by termination of any operations and that production was never achieved, contrary to this Board's finding in 1974. The report of the 1972 30-day test (assuming that there was a written record of the results of the attempt to start the mill into operation), was not offered into the record. This omission has now enabled claimants to argue that the sole impediment to development has been the hostile climate created by Forest Service administration

of the Sawtooth National Recreation Area (SNRA) since the SNRA was created around these disputed millsites in mid-1972. This argument, however, is inconsistent with the quoted testimony by Swanson that the results of the only operational test run of his mill since 1960 were too low to permit continued operation. This revelation from the 1981 hearing casts substantial doubt upon the validity of all the millsites, both the original group of 7 and the expanded group of 16 satellite claims.

The district court and the 1974 Board assumed, because it was believed there was actual production from the mill, that some of the millsites were valid. The 1974 Board stated the issue before it to be: "The major problem in this case revolves around the Government's second contention that more land was located than actually needed for mining and milling purposes." United States v. Swanson, 14 IBLA at 171, 81 I.E. at 20. Whatever the Board and the district court may have believed concerning the issues in the first contest, therefore, is now beside the point, since later evidence from the 1981 hearing shows that the issue here is whether there was ever actual use or a reasonably justified occupation of any of these claims within the meaning of the mining law based upon the milling operation described by Swanson. Clearly, the validity of all these claims was placed in issue by the successive Forest Service challenges to both groups of millsites.

Because of the pending remand order from the district court, which requires that there be fact-finding concerning the four original claims which were annulled by this Board in 1978, however, it is not possible to simply review the original seven claims in the light cast by the testimony given at

the 1981 hearing, nor would such a procedure be fair since it would deny claimants the opportunity to be heard concerning the proper effect to be given to this new evidence of nonuse. They must be permitted to explain the apparent contradictions raised by the 1981 evidence in any event. Yet if one adopts the position taken by the majority, and accepts uncritically the premise that some, but not all, of the claims are excessive to claimants' operation, but that there is a valid core of claims which has reasonably been devoted to mining or milling, one must ignore the evidence taken in 1981.

This evidence tends to show that for at least 21 years none of these claims have been used for milling or mining purposes, and that they have not been occupied in good faith during that time for those purposes. Certainly, as to the original seven claims, despite the length of time this appeal has languished undecided upon the docket of this Board, another fact-finding hearing is needed to resolve the contradictions raised between the 1972 hearing, this Board's 1974 decision, the district court's order of remand, and the evidence produced at the 1981 hearing, which indicate that the prior proceedings were premised upon a basic error of fact. I, therefore, conclude that as to the original core claims, a further hearing should be held to inquire fully into the validity of all seven claims. Since this issue has become apparent for the first time on appeal, the Board is in no position either to resolve it or to ignore it; there is therefore no alternative to a further hearing.

The majority profess to find enough evidence in the record to establish a preponderance of evidence showing that claimants actually occupied certain

of these millsites from both groups in good faith for mining and milling purposes based upon claimants' occupancy of the mill with the intent to operate it. To do so, on this record, requires nearly an act of faith. In fact, claimants' evidence tends to support a contrary finding.

As previously pointed out, Swanson testified in 1981 that the commodity produced by the 30-day test run of his mill was of low value. Although, according to his stated plan, it was his intention to first mill the old tailings located on the millsites, which he estimated would be profitable in the economic climate then prevailing, it does not appear that he followed his plan for the use of tailings during the test run. The actual conditions and results of the test are undisclosed. While obvious questions raised by claimants' reluctance to make known the results of the test run were not pursued by counsel for the Forest Service, there was also no tactical reason for him to do so. By allowing claimants to avoid detailed explanations of their milling costs, the reasons for claimants' failure to place the mill into operation ultimately resolve towards a single conclusion; they have been economically unable to operate the mill for over 20 years. Certainly, also, Swanson's failure to disclose the results of the 1972 test at the 1981 hearing affects the weight of his testimony concerning his plan of operations and casts doubt upon the value attributed by him to the tailings piles and the developed reserves in the mines, since one or the other (or both) of those material sources were certainly used for the test. The value of his testimony to show his occupancy was done in good faith is further clouded by his failure to offer any proof of the cost involved in transporting and marketing his finished products. He could hardly expect that his estimate of the cost of milling would be complete without such an important item.

Further, Swanson concluded that the mill, although it had not been run for 20 years, was in operating condition. But he testified that the water system, essential for mill operations, was not functional (Tr. 20). This forms an internal contradiction in his testimony which h is unresolved. The existing water system is decrepit. Plans to replace it with something else, however, have been frustrated by the Forest Service, according to Swanson (Tr. 34, 78). Whatever the cause, it appears the mill is presently without a water supply and also without a source of hydraulic power, and must rely upon expensive diesel power to operate, were it to do so (Tr. 22-29, 46). It is therefore not correct to say that the mill is functionally operational, since it must have water to operate, and, while there is water nearby, it seems clear that there is no longer a usable water system in place to serve the mill.

According to Swanson, economy of operation required the use by the mill of auxiliary water power, which was not then currently available. Although it is not clear that his calculations concerning cost of operations included the assumption there was an auxiliary water system in place, it is reasonable to conclude from his testimony that this was a necessary requirement for economic operation of the mill. Swanson's conclusion the mill was economically operable in 1981 is therefore contradicted by his own testimony. Unless he is able to resolve this apparent conflict by proofs not offered at either previous hearing, his testimony concerning the utility of his mill is undermined by his own statement.

The plan of operations described by Swanson at the 1981 hearing has been rejected by the Forest Service (Tr. 78). The alternative Forest

Service proposal for operations would clearly result in a higher cost of operation, since it would require water to be pumped uphill, instead of using the gravity-flow water system envisioned by Swanson (Tr. 34, 140-44). The effect of this circumstance upon the economic operation of the millsite was not considered by the administrative law judge and is not evaluated by the majority. It poses a problem which cannot be resolved in claimants' favor without another hearing at which evidence of the added costs caused by this factor can be taken.

Swanson also testified that, pending use of the mill for operational production, high-grade ore from the Livingston mines has been, and will continue to be, sorted and sold without milling (Tr. 53). The total picture that tends to emerge from the facts supplied by Swanson, is that there has been no production from the mill, because for a number of reasons the milling operation is not economic. To the extent the millsite has been used in connection with the patented and unpatented mining claims with which it is associated, it serves as a depot, where ore is subjected to sorting before it is shipped elsewhere for processing. This is a totally different operation than the 1974 Board or the district court which reviewed the 1974 Board decision were led to believe existed on these millsites. The contradictions inherent in the facts revealed by the 1981 hearing should be dealt with directly. The majority fail to do so, because the record is inadequate to permit a full evaluation of all these claims in light of the revelations of the second hearing.

The requirement that a "discovery" exist in order to validate a mining claim does not apply in the case of a millsite, which the law requires be

"nonmineral." See 30 U.S.A. § 42(a) (1982). The millsite statute, so far as applicable here, provides:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such non-adjacent land shall exceed five acres, * * *.

30 U.S.A. § 42(a) (1982).

It is apparent the requirement of section 42(a) that a millsite claim be "used or occupied * * * for mining or milling purposes" is a precondition to the establishment of a meritorious millsite claim in the same manner as the requirement that a "discovery" exist is a precondition to proof of a valid mining claim. Compare 30 U.S.A. §§ 23 and 42 (1982). Thus, in the event of a Government contest of a mining claim, either lode or placer, the claimant must be prepared to show the existence of a valuable mineral deposit which a prudent man would be justified in working with a reasonable prospect he could develop a valuable mine, if Government proof to the contrary is to be overcome. See Cactus Mines Ltd., 79 IBLA 20 (1984). This requirement has its counterpart, in the case of a millsite claim, in the requirement that when the Government has shown a millsite has not been used for mining or milling purposes, the millsite claimant must overcome the Government case by a contrary showing. Thus, proof of nonuse of a millsite for mining purposes establishes a prima facie case for invalidity of the millsite. See United States v. Cuneo, 15 IBLA 304, 81 I.E. 262 (1974). The Department has taken

the position, despite the obvious differences between millsite and other mining claims, that the same procedural requirements shall apply to millsite claimants as to mining claimants. United States v. Swanson, supra at 180, 81 I.E. at 24-25. Eagle Peak Copper Mining Co., 54 I.E. 251 (1933). Thus, the burden of proof in a contest of either the mining claim or the millsite claim is upon the claimant, who must establish his case by a preponderance of the evidence at hearing. United States v. Hooker, 48 IBLA 22 (1980).

The reasoning of the 1982 decision by Administrative Law Judge Mensch concerning the 16 satellite claims obscured the substantive distinction between mining and millsite claims, and, in so doing, prepared the way for error by leading him to equate the fact of nonuse of a millsite to the failure to develop a mining claim. Although placer mining claims, lode mining claims, and millsite claims can be generally described as "mining claims," they represent, in law and in fact, quite different interests in land. The unique character of the millsite claim is defined by the use to which the land is to be put. The character of lode and placer claims is determined by the nature of the mineral which can be extracted from them.

Here the Government established that claimants have not operated their mill since 1960, a period which encompasses the entire tenure of their ownership of these claims, except for a 30-day test in 1972. In that time, the hydro-electric works have deteriorated from nonuse and become nonexistent. The testimony of the Forest Service employees establishes also that during the same period there has been no milling activity on the millsite claims, while Swanson's testimony confirms that his primary efforts have been spent on his lode mining claims, "raising reserves" and otherwise exploring and

preparing other patented and unpatented claims for further development. For 21 years, the only connection between the millsite claims and claimants' mining operations has been some use as a dump and sorting area for ore shipments. The location of this activity on the claims is not specified nor is the extent of the operation described.

The decision in Charles Lennig, 5 L.D. 190 (1886), established that, in the absence of actual use of a millsite for mining or milling purposes, to preserve his claim the millsite claimant must show "an occupation, by

improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes." Id. at 192. This case presents a situation where the millsite claimant claims to be making a "good faith" occupation of the sites with the intention in the future to sometime use the sites for milling, while some parts of the claims are being used for ore storage pending shipment. These two phases of the "mining and milling" operation on the 23 millsite claims are apparently unrelated and involve quite different legal considerations. Claimants' evidence is concerned almost exclusively with the mining operation. Yet it is clear that both claimants and the Forest Service considered the milling operation to be of paramount importance to the issue raised by the 1981 contest. For this milling operation, the question whether occupancy was made in good faith is the principal issue.

The meaning of the term "occupation" was considered by Secretary Lamar in Charles Lennig, supra:

> I am also of the opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be

> evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.

Id. at 192. The logic of the Secretary's decision establishes that nonuse of the millsite claim establishes a strong case the claimant has not occupied the land as required by statute. Unlike the situation with mining claims, this cannot be overcome "by virtually any evidence explaining the reasons for the nonuse of the millsites." Decision at 12. Rather, as the Lennig decision indicates, the claimant "must show such an occupation by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes." Id. at 192. In other words, the standard to be applied is objective. In Cuneo the Board further explained this principle:

> In considering the issue of occupancy of a millsite which is not being used, we must apply a test of reasonableness to determine whether the period of nonuse demonstrates invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; the marketing conditions; costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on the site. [Footnote omitted.]

Id. at 326-27, 81 I.E. at 272-73. Although Cuneo's millsite claims involved independent millsites, as the quoted list of validity factors demonstrates, the general principle announced by the Cuneo decision is applicable to dependent millsites as well: the requirement that a millsite be held in "good faith" is an objective, not a subjective standard.

Cuneo states this principle directly when the opinion observes: "In ascertaining whether a claimant under the millsite law has satisfied the statutory requirements, an objective standard is also required to assure that the purposes of the law are met." Id. at 323, 81 I.E. at 271.

Indeed, as the Cuneo opinion points out, an objective standard to measure good faith is the rule used in deciding the validity of mining claims in general, as, for example, in the case where a claim of discovery is evaluated. In such a determination, "[t]he test has been objective -- what a prudent man would do -- not what the claimant himself would or wants to do." Id. at 323, 81 I.E. at 271. Prior Departmental authority indicates the existence of a quantity of valuable mill tailings on a millsite is not alone a validating factor for a millsite and that "the mere intention to use land for mining and milling purposes some time in the future is not sufficient to validate a location." United States v. Herron, A-27414 (Mar. 18, 1957).

Appellants' subjective good faith in assessing the ultimate value of the Livingston milling operation is not, therefore, a relevant consideration in deciding this appeal. There is not, nor should there be, any authority which will permit this Board to judge the validity of those claims based upon the subjective beliefs of claimants. It is undeniable on the record as developed in the course of the contest of all 23 millsites that none of the sites have been used for milling purposes since 1960. In 1972, at the time of the withdrawal of the land upon which the millsites are located from the operation of the mining laws, the claims had not been the site of actual milling operations for at least 12 years. By the time of the contest action

against the 16 peripheral claims the mill had been idle for over 20 years, in contrast to the period of 15 years found to be invalidating in Cuneo. It is true that in this case, unlike Cuneo or Herron, the claimants have also performed work on the associated claims and in the mines from which they state an intention to supply the mill with ore. In these respects they have fulfilled some of the objective "factors" stated by the Cuneo decision. It also appears they have conducted a mining operation independent of the mill. But the fact they have sorted and shipped some of these "reserves" without milling them indicates the mill with its associated structures and improvements is altogether irrelevant to claimants' mining operation. There is ample reason to question whether any of the millsites which are claimed based upon occupancy for milling purposes can be valid for that reason. Certainly, claimants have not shown by a preponderance of the evidence that they have occupied any claim for milling purposes.

Although his testimony suggests otherwise, Swanson explains the failure to be able to place the mill operation into production as owing entirely to the fact the Livingston mines and mill are now located within the Sawtooth Recreation Area, and, therefore, have become subject to intense Government regulation. Assuming this to be correct, for the purposes of decision, merely serves to explain why the operation is idle now. It does not explain the failure to operate the mill between 1960 and 1972. A somewhat similar situation was present in the case of the Cuneo claims, which were located near the west entrance to Yosemite National Park. In Cuneo, however, a depressed market for tungsten and a shortage of high-quality ore also clearly had an important part in preventing operation of the mill, a tungsten milling plant.

It does not appear, however, that in this case depressed market conditions have prevented operation of the Livingston mill.

As was observed by this Board in United States v. Werry, 14 IBLA 242, 252, 81 I.E. 44, 49 (1974): "[A] vague intention to use the land at some future time does not satisfy the requirements of the statute." Swanson testified that his efforts to obtain needed funding to place the mill into operation had been unremitting, but also unsuccessful, from 1960 until 1981, establishing that for the preceeding 21 years there had been no use of the millsite for milling purposes. So far as the record now before the Board goes, it cannot be said his plan to put the mill into operation has been shown to have an objective basis in fact. It is more nearly revealed to be a vague intention to operate the mill at some future time without regard to the costs of such an operation.

Because a prima facie case against the validity of the millsite claims is established by proof of the claimant's nonuse of the claims, Swanson in this case had an affirmative obligation to establish by a preponderance of the evidence that the land embraced by the claims has been occupied for mining or milling purposes since the date of withdrawal. It is not sufficient to show Swanson would have been justified in occupying the claims if he did not, in fact, do so. In order for his occupancy to have been justified, the law requires that it must have been reasonable, that is, that a reasonable person would have been justified in the circumstances of this case in occupying the claims for milling purposes under the conditions described.

The major weakness of the stated majority position which concludes Swanson has proved good faith occupancy of some of the claims through his future plans for the mill is that the record indicates Swanson's belief in the value of these millsites for milling purposes is wholly subjective and may also be unreasonable. He has shown the expenditure of time and money upon a project which apparently has no reasonable expectation for success in objective fact. The Forest Service's proof showing the mill has not been occupied for milling purposes remains largely unrebutted by claimants. It is simply not enough to show claimants have spent money upon a project in which they believe. For, were belief alone determinative of validity, no miner's claim could ever be invalidated no matter how far-fetched it might be in fact, provided the miner could show he had worked hard to develop it. To support the majority conclusion, more facts concerning actual costs to operate the mill are needed, at a minimum. It seems probable that those costs are higher than the value of the commodity to be produced, at least on the existing record of hearings held.

The second serious weakness in the majority position is that it must ultimately rely upon the Administrative Law Judge's admittedly erroneous finding that Swanson's evidence concerning the economic value of his mill ultimately preponderated over the Forest Service's proof of the claim's invalidity. There is no way that this finding by the Administrative Law Judge can be salvaged. His decision began by mistakenly minimizing the effect of the Forest Service's proof, stating: "However, as noted in Hooker, '[a] case which is totally dependent upon the failure of a mining claimant to develop a claim, is, however, a weak case at best,' and little evidence is required to overcome the presumption which arises from non-development or

nonuse." Decision at 11, 12. As the majority concede, this was error. However, this being said, the Administrative Law Judge then went on to apply an erroneous evidentiary rule to the analysis of the facts developed at the hearing derived from his view of the "weak case" presented by the Forest Service. The finding so reached (now also relied upon of necessity, although explicitly rejected by the majority) is wrong; thus, the Administrative Law Judge states, at page 12 of his decision:

> The millsite claimants had the burden of overcoming the prima facie case created by the presumption. As I read Hooker, this could have been done by virtually any evidence explaining the reasons for the nonuse of the millsites. The millsite claimants did not, as explained in Hooker, have the burden of establishing that the requirements of the law had been met and the millsite claims were valid at the time of the withdrawal and the time of the hearing, i.e., that a person of ordinary prudence would have been justified at both periods of time in occupying a part or all of the contested millsite claims with a reasonable expectation that the land was valuable and necessary for mining or milling operations.

The last sentence quoted above wrongly disclaims any need to rule upon the sole issue raised by the Government's case. Yet, were the administrative law judge's ruling to be rehabilitated as the majority seek to do, more proof concerning the reasons why some of these claimed millsites should be considered valid needs to be supplied.

The holding in Hooker has been explained nearly as often as it has been applied. See, e.g., Cactus Mines, Ltd., 79 IBLA 20 (1984); majority opinion, infra. However, the principle it stands for is undoubtedly correct; a miner defending a Government contest of his mining claim need not concern himself

with issues not raised by the Government's case. But there is no way to stretch this principle so as to permit a miner to avoid dealing with the sole issue fairly raised by a Government contest. The majority holding permits exactly that result. On the record now before this Board, claimants have failed to show they were justified in occupying these millsites for their milling operations. Their proof tends to show that some of the millsites were used for mining purposes, but only for ore storage, and that milling was made problematic on other millsites by costs which were never fully explained.

The fact-finder finally completed his reasoning on the sole issue in this appeal by stating:

> There is no dispute over the fact that if the associated mining claims and/or the tailings piles contained sufficient mineralization to warrant a mining or milling operation at both periods of time [relevant to the contest], then, at least some of the millsite area was valuable and necessary for mining and milling operations at the crucial periods of time.

Decision at 12. This begs the question asked. The factfinder simply used the Hooker decision to avoid the only issue in controversy between the parties: whether the facts as proved showed occupation of any of the millsites was justified as an objective fact. A decision was, of course, made difficult by the fact it would have required an objective evaluation of the expenditure by claimants of a lifetime of work and substantial sums of money upon a mining venture of dubious worth. The sketchy proof by claimants concerning the cost to operate their mill under the circumstances imposed by the Forest Service's administration leaves much to the imagination of the fact-finder, and little to permit a favorable result for the claimants can be

found in the recorded evidence of the hearing. But a decision upon the merits was not made by the Administrative Law Judge, and is now being avoided by the majority by a similar logical sleight of hand. The question still remains: how have claimants shown their occupation of the millsites to be reasonable?

The ensuing passage of time has not made decision easier, and may have helped to obscure resolution of this appeal, as the majority observe, since it has been accompanied by a decline in metals prices. Certainly, the fact that no evidence of costs of transportation and marketing was offered at the 1981 hearing makes a decision even more problematic. See, e.g. United States v. New Jersey Zinc Co., 74 I.E. 191 (1967) (where transportation costs were the crucial item in proof of potential profitability of a mining claim). Claimants' conflicting evidence concerning the cost to produce a marketable commodity from the mill operation, which was described by Swanson, is clearly insufficient to establish a reasonable basis for his continued belief in the value of these millsites for milling purposes.

Although the record establishes claimants have not used the mill and the associated buildings for milling ore from their claims or tailings from the millsite, it does demonstrate they have used the millsites for storing ore, sorting it, and shipping it to market. This evidence establishes a use of the millsites associated with claimants' mining claims which could entitle them to some part of the claimed land independently of the milling operation. The record before us does not establish where these shipping activities took place, however, nor is the extent of this "highgrading" operation ever explained. For this reason, as to all the millsite claims, there is a need

for a further hearing to determine the nature and extent of the use described. It seems unlikely that more than a single 5-acre millsite could be required for the limited shipping operation indicated. However, since the location of the storage and sorting area and the frequency of use are presently unknown, claimants should be permitted to prove the location and extent of the millsite needed for their sorting and shipping operations. Further, as to the milling operation, the evidence is in conflict in the ways previously described in this opinion; the error in the 1974 decision has so confused the record that, if claimants were to be able to explain objective reasons for continuing to occupy some of these claims for milling purposes, they should be obliged to now demonstrate the economic feasibility of their plan of operations in the light of their failure to operate since 1960.

Therefore, in order to permit claimants to establish the extent of their actual use, and also to permit them to explain the contradictions between their proofs at the 1972 and the 1981 hearings, another hearing should be ordered, at which the extent of the actual use and occupancy by claimants of all 23 millsites should be decided. Claimants should also be permitted to show that their mill can now be operated at a profit and should be allowed to explain the contradictions now appearing of record concerning the past operation of the mill. Because the majority seek to end this matter without the rehearing which is needed to resolve the remaining conflicts in the evidence, I dissent from their resolution of these contests.

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Franklin D. Arness
Administrative Judge